MARIA ISABEL CUEVAS FROUFE DE v ANINDA KUMAR DE (1979) Z.R. 32 (H.C.)

HIGH COURT
SAKALA, J.
21ST DECEMBER, 1978
1977/HP/D11

Flynote
Family law - Divorce - Rehearing - Application for - When to be granted - Matrimonial Causes Act, r. 54

Headnote
This was an application under r. 54 of the Matrimonial Causes Act, by the husband for setting aside a decree nisi granted to his wife by the court in a divorce petition. The husband also applied to be at liberty to file an answer and have the petition re-heard. On the issue, as to whether a re-hearing could be ordered -

Held:
(i) It is necessary for the applicant to satisfy the court that he has a case which he wishes to put forward and which if accepted, might well load to a different result. The court is not bound to accept the applicant's affidavit at it's face value, but on the other hand should not attempt to make any such investigations of its truth, as would be appropriate at the hearing of the suit.
(ii) The court must satisfy itself that the proposed answer presents a prima facie case to the petition.

Cases referred to:
(1) Montague v Montague [1968] P. 604.
(2) Winter v Winter [1942] P. 151.
(3) Tucker v Tucker [1949] P. 105.
(4) Owen v Owen [1964] P. 277.
(5) Stevens v Stevens [1965] P. 147.
(6) Nash v Nash [1967] 2 W.L.R. 1009.

Legislation referred to:
Matrimonial Causes Act 1969, r. 54.

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For the petitioner: D. Lewanika, Shamwana & Co.
For the respondent: A.M. Hamir, Solly Patel, Hamir & Lawrence.

Judgment
SAKALA, J.: This is an application under r. 54 of the Matrimonial Causes Act by the husband for

setting aside a decree nisi granted to his wife by this court on the 26th August, 1977, in a divorce petition. The husband also applies to be at liberty to file an answer and have the petition re-heard. No error of the court is alleged at the hearing.

The grounds in support of the application are set out in the notice as follows:

"(i) That about since March 1977, after having been served with the petition for the Dissolution of the marriage and other ancillary documents the Respondent had endeavoured to persuade the Petitioner to discontinue the proceedings and reasonably thought that the same would be discontinued notwithstanding that the Petitioner intended to pursue the same by reason that the parties continued to occupy the same matrimonial home though in separate bed-rooms and had on a number of occasions attended functions together;

(ii) That thereafter the Respondent received Notice of Hearing about three or four days before the actual hearing of the petition which was set for the 22nd day of August 1977, and he approached a firm of advocates by the name of Jacques & Partners and the day after such receipt of Notice of Hearing approximately on the 18th August 1977, instructed the advocates to defend the petition;

(iii) That the said advocates prepared the documentation summons to extend time and affidavit in support of the purpose whereof was to enable the Respondent to defend the petition;

(iv) The Exhibits 'AKD. 1' and 'AKD. 2' were being typed on the Friday preceding the date of the hearing but the Respondent was informed by his advocate that the same could not be filed as the High Court registry closed at three o'clock in the afternoon;

(v) That on the grounds that he had lost the opportunity of defending the proceedings in that he had instructed his advocates to defend it before the hearing date and that the documents could not be filed in time or otherwise."

The affidavit in support of the application after setting out the respondent's particular and restating the grounds for the application as set out in the notice goes on to say:

"9. That I then instructed my advocate to go to Court but was instructed by Mr Banda of Jacques & Partners that he could not go to Court as he had not filed the relevant documents appointing himself as my lawyer in the proceedings and hence no appearance was made in Court by my advocate nor myself;

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10. That on Monday the 22nd August, 1977, my wife informed me that the case had been adjourned to Friday the 26th August, 1977, and I immediately saw my advocate who informed me that there was still an opportunity to file documents prepared by him and I had the affidavit sworn by Christopher Russell Cook and Co.,

11. That I was advised by Mr Banda and verily believe that the said documents were sent to court for filing; but with the exception of Acknowledgment of Service the Summons and the affidavit were refused to be received by the court for filing by reason that the court was on vacation;

12. That in consequence thereof the filing of Acknowledgment of Service was irregular and I am advised by my advocate was properly ignored by the court;

13. That I am advised by my advocates that the proper course would have been for an application to be made to file an answer after directions were given which application, subject to its merits, would have caused an adjournment and I would thereafter have been given an opportunity to file an answer and defend it on its merits;
14. That my advocate and myself attended court on a Friday 26th August, 1977, for the date set for Judgment but my lawyer did not address the court;
15. That I deny that I have behaved in such a way that the Petitioner cannot be reasonably be expected to live with me and the said marriage has broken down irretrievably;
16. That annexed hereto marked exhibit 'AKD. 3' is a copy of my proposed answer;
17. That I humbly request and pray that this court would set aside the Decree Nisi granted on 26th August, 1977 and permit me to file an answer herein and the said petition be re-heard."

The brief history of this ease is that, on the 23rd February 1977 the wife presented her petition for divorce on the ground that her marriage to her husband had broken down irretrievably for the reason that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with the respondent. The petition was served on the husband on the 4th April 1977. On the 12th July 1977, the deputy registrar gave directions for the trial of the cause as undefended. On the 29th July 1977, a notice of setting down was issued. On the 11th August 1977, a notice of hearing was issued fixing the hearing date of the cause as 22nd August 1977, at 0900 hours before me.

On the 22nd August 1977, the hearing of the cause commenced at 1000 hours the court having been delayed by a chamber application and lack of court room. Before evidence in support of the petition was led, Mr Lewanika who appeared for the petitioner informed the court that the petition was undefended. It will also be observed that up to the hearing date, there was no acknowledgment of service on the record and no other

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document by the respondent was filed. At the end of the petitioner's evidence, I reserved my judgment to the 26th August 1977.

On the 24th August 1977, at 1445 hours a document purporting to be an acknowledgment of service in the cause was brought into my chambers by my marshal. For the purposes of record, I put down the following note:

> "*Court*: I am at this hour in receipt of an acknowledgment of service from the Respondent in this matter. The acknowledgment of service bears the High Court stamps dated 24th August 1977 and 23rd February 1977. This matter was fixed for hearing for the 22nd August 1977, and a notice to that effect was sent on the 11th August 1977, with a copy to the Respondent. On the date of the hearing, the Respondent was not present nor had he filed the acknowledgment of service. The judgment in this matter is now ready and will be delivered on the 26th August 1977. The proceedings in this matter were heard as undefended. I am unable to appreciate the logic of the Respondent in this case by filing an acknowledgment of service two days after the proceedings have been heard.The acknowledgment itself is most dubious in that answers to some questions are in pencil and others typed. It is undated.

> Regrettably, it is signed by Jacques & Partners. I can only presence it is a firm of lawyers acting on behalf of the Respondent. If they are, then the Respondent or their client has not told them the truth. If they are actually acting for him, I consider their action as an abuse of the court process in that, they should and must know that when a matter has been set down for trial, no pleadings can be filed without leave of court.
> I hold therefore that the document purporting to be an acknowledgment of service filed today is not such a document. In any event, I have already written my judgment based on the petition of the petitioner supported by her evidence in open court."

It will be observed that on the 26th August 1977, before delivering my judgment, I read the note in open court. In my judgment, for reasons clearly set out therein, I granted a decree nisi and custody of the two children of the family to the petitioner.

On this history of the cause and on the husband's affidavit evidence, I am asked to set aside the decree nisi, allow the husband to file an answer and order that the wife's petition for divorce be reheard. It is also convenient to mention at this stage that the wife filed an affidavit in opposition. The relevant paras are (5) and (6) which read as follows:

> "That I am advised and verily believe that the Respondent herein has applied to the court for leave for the petition to be reheard on the ground that there is possibility of a reconciliation between himself and myself;

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> That at no time had I indicated to the Respondent that I was going to discontinue the proceedings herein and since the grant of the decree nisi at no time had I indicated to the respondent that I was prepared to be reconciled to him and in fact I verily believe that there is no possibility of a reconciliation between the respondent and myself."

On the 24th November 1978, on the date of the hearing of the application, Mr Hamir appearing for the husband informed the court that he had just received the affidavit in opposition that very morning and had, therefore, no opportunity to make a reply. I granted him leave to lead viva voce evidence in reply to the affidavit in opposition.

In his reply, Mr Aninda Kumar De testified that he had seen the affidavit in opposition where his wife stated that there was no possibility of reconciliation. He told the court that in February, this year he went out of Zambia on vacation. During this time, he stayed with his wife and the children in his father-in-law's house in Spain for one month. He spent the easter holiday with his wife and children in a rented three-bedroomed flat in England for about a week. He said he did not agree with his wife that there is no possibility of reconciliation. He said his wife has written him about getting a job in Spain. But the problem would be one of language as he does not speak Spanish. He said his wife said she would assist him with a job. The witness produced the letter from his wife and was marked exhibit "D1". He also told the court that he has discussed the possibility of reconciliation with his wife. He said his wife's response is that, he must show he means reconciliation and not just talking. For this reason, he has decided that he stays in Spain for some time.

When cross-examined, the respondent told the court that on being served with the petition, he made various attempts at reconciliation. He never took it serious that there would be a divorce. But he did not manage to persuade his wife to withdraw the proceedings. He said on the day of the decree nisi, they slept in the same bed although there was no sexual relationship. He has made attempts at reconciliation since the decree nisi but she has said it must be shown rather than by word of mouth. He said he went on holiday to see the children and to persuade his wife not to be arrogant and dogmatic. He said he has applied for a rehearing because he thinks there is still a possibility of reconciliation. He said his wife's affidavit appears to reveal some misunderstanding as she appears to believe that he had told his lawyer that she agreed to reconciliation. He said his wife has indicated on telephone that she would go with him to India on holiday and she would come to stay with him in Zambia. He said when he went to Spain, she met him at the airport and said she had found him temporary employment for a month but he declined to take it. In re-examination, he said after notice of hearing, he went to see a lawyer to defend the petition because he believed he had a defence.

On behalf of the respondent, Mr Hamir argued that on receipt of the petition, the respondent endeavoured to persuade his wife to discontinue the proceedings. But in error, he believed that she would do so as she

continued to live with him in the same house and attended functions together. He also argued that after notice of hearing, the respondent instructed Jacques and Partners to defend and, documents to this effect were prepared, and an attempt to file them was made. Mr Hamir submitted that because of the failure of the respondent's advocate to act promptly and properly when in a position to do so the respondent lost an opportunity and was denied an opportunity to put forward to court all relevant facts on which to decide whether a decree nisi be granted or not.

On the question of rehearing, Mr Hamir referred the court to pages 638 to 640 of *Rayden on Divorce*, Volume One, 12th edition where a number of cases are cited in which applications have been granted or refused. Mr. Hamir submitted that what is being applied for is not that the petition should not be granted but that the court give consideration to all the matters which can only be done if the respondent is given an opportunity to be heard why the marriage has not broken down irretrievably.

On behalf of the petitioner, Mr Lewanika argued that the only ostensible purpose of this application is to give the respondent a hearing of what is contained in the petition. He contended that the court will have to consider that the respondent is a professional man and not an illiterate. He was served with the petition on the 4th April 1977. He must have read and understood the relevant documents. Mr. Lewanika submitted that on the evidence that was before the court in the divorce proceedings and also before the court in this application, there would be no benefit in the petition being reheard bearing in mind that it is not the duty of the court to preserve the marriages where the whole stratum has been removed.

I have very carefully addressed any mind to the evidence before me. I have also fully considered the

arguments and submissions by both learned counsel. Several documents were exhibited in support of the application, among them was the answer to the petition. It is therefore significant that I make it clear at this juncture that my primary concern is not the merit of the answer to the petition, but the merits of the case put forward for rehearing. The issue, therefore, is not whether the respondent has a good defence to the petition or not.

The first question for consideration is whether the respondent after his persuasion of his wife to discontinue the proceedings reasonably believed that she would do so. The husband's argument is that, because they lived in the same home although not in the same bedroom and because they attended functions together, he believed in error that she would discontinue the proceedings. In his own evidence, the respondent admits that he did not manage to persuade his wife to withdraw the proceedings. Speaking for myself, I find no basis for any error. The respondent Is a professional man. He received the petition for the dissolution of marriage including a notice of proceedings as well as the acknowledgment of service and other documents some time in April 1977. These documents speak for themselves. The least the respondent would have done in my

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view was to acknowledge service which he did not do. The wife, according to the respondent's own evidence slept in a separate bedroom. In those circumstances, taking into account the allegations against the respondent as contained in the petition, it does not strike me as odd for the wife to have attended functions with the respondent perhaps out of fear. In any case, if she continued to sleep in a separate bedroom, there was no basis in my view for believing that she would discontinue the proceedings. There is no evidence that the wife agreed to discontinue the proceedings. I am therefore satisfied on the evidence before me that there was no basis for the husband to believe that the wife had abandoned or was abandoning the divorce proceedings. If there was an error in believing that his wife would abandon the proceedings, then the error was wholly self-induced by his reluctance to accept that his marriage was breaking up. In the case of *Montague v Montague* (1) an application For rehearing was granted to the husband mainly on the evidence the wife had lulled the husband into a false sense of security prior to the hearing and had not given him reasonable opportunity to get the suit stayed. This case is distinguishable from the instant one. I find noticing done by the wife which would be said to have lulled the respondent into a false sense of security.

It will, however be observed that in *Montague* case (supra) the application was granted despite the fact that the husband had specifically indicated to the registrar that he did not wish to defend the suit. There was no such indication in the present case. But the evidence suggests that after the husband received the notice of hearing, he instructed a firm of lawyers to defend the petition. But the lawyers did not only act impromptly but prepared and served incorrect documents while filing the correct one irregularly.

In these circumstances, it is submitted that the respondent was denied an opportunity to put forward the relevant facts for the court to decide whether the marriage had broken down irretrievably on the ground that the respondent had behaved in such a way that the petitioner cannot reasonably be expected to live with him.

I said earlier that the issue in this application is not whether the respondent has a good defence to

the petition. That is a matter for consideration when the petition is reheard if this application is granted. There is an abundance of English authorities where applications for rehearing have been granted and refused. (*See* the notes at pp. 638 to 639 of Rayden on Divorce, Volume one 12th edition.) A mention of a few of these may provide some good guidance.

In *Winter v Winter* (2), a Divisional Court held that if there was good reason to believe that the matrimonial offence upon which a decree nisi had been founded had never in fact been committed, the decree nisi ought to be set aside even if the respondent had stood by and with full knowledge of what was happening allowed the decree nisi to be made without any resistance. This case was considered and distinguished in

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Tucker v Tucker (3). The facts of the Tucker case from the headnote are as follows: In January 1948, a husband petitioner filed a petition for divorce on the ground of cruelty. The petition was duly served on the respondent by registered post, and she completed and returned the memorandum of appearance. In that memorandum she stated that she did not wish to answer the petition, but wished to be heard as to costs (which were not in fact claimed) and alimony. She was informed of the date of the hearing; but she was neither present nor represented when a decree nisi was pronounced on the prayer of the petitioner on 3rd June 1948. On 12th July 1948, however, she gave notice of motion as a poor person to set that decree aside, alleging that in December 1947, the petitioner had condoned the cruelty alleged and that, although she had applied for a poor person's certificate before the hearing, that certificate was not issued until after the decree nisi had been pronounced. It was held that on the material before it the court had no good reason to believe that the husband had wrongfully succeeded in his suit, and that it was not in the public interest to order a re-hearing. *Winter v Winter* (2), was considered and distinguished. Pilcher, J., in Tucker case pointed out that the court will consider whether the new matter put forward so changes the complexion of the cause as to satisfy the court that on that material the order originally made would, or probably would, have been different.

In *Owen v Owen* (4), Scarman, J., at p. 284 has a passage described as "illuminating" by Cairns, J., in *Montague* (*supra*). It is convenient to set out the whole passage which reads as follows:

> "We think that today the justification for the existence of the court's power to order a rehearing is the public interest and that its exercise should be governed primarily by that consideration. The true nature of the public interest is, as Pilcher, J. remarked in *Tucker v Tucker*, to see that in matrimonial matters, where questions of status are involved any order made by the court is made upon the true facts. Certainty is not without the power of the court to achieve; but it must be satisfied that there are substantial grounds for the belief that a decree has been obtained contrary to the justice of the case before it takes the serious step of setting aside an order of the court obtained by due process of law. It is, we think, in this context that the conduct of the parties has to be considered. If the court is satisfied that there are substantial grounds for believing the decree to have been obtained contrary to the justice of the case, not even gross laches by the applicant as in *Winter v Winter*, nor deliberate suppression of documents as in *Peck v Peck* will defeat the application. But if a respondent in possession of her faculties, with the facts of her married life in mind, and with the benefit

of clear legal advice and her solicitor's explanation of the issues involved, takes a deliberate decision not to defend or not to negative any suggestion of "hoodwinking" the court, then this Court, should, in our opinion, view a subsequent application for a new trial with a degree of reserve. A decision thus

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taken would, in our view, throw doubt upon the case subsequently put forward that a decree has been obtained contrary to justice. Further, if the case sought to be advanced is cruelty (with its concomitant that the matrimonial cohabitation has become unendurable) and there is a recent history of attempts by the applicant at reconciliation, her complaints of cruel conduct must inevitably be viewed and assessed in the light of such attempts. The question thus arises as to the way in which it is proper for the court to deal with and assess, evidence adduced in applications under this rule. Both members of the court touched upon the subject in Tucker v Tucker. Although their choice of language differed, both accepted that the court had to cone to a conclusion whether or not there was material upon which it was reasonable to suppose that a decree had been obtained contrary to justice. Hodson, J'., after stating the test, added these words: "that is, material put forward by the applicant, and assuming in the applicant's favour that all she is accurate." We do not think that the judge intended these words to be of universal application; indeed he himself disregarded them when dismissing from consideration the applicant's sworn denial of cruelty. We think that the judge had in mind that the hearing of the application is not the hearing of the suit, and that the Divisional Court cannot investigate or decide questions of fact which would arise upon the new trial, if granted. But the Divisional Court must assess and weigh the material adduced in all its surrounding circumstances and against the background of the matrimonial history so as to reach its conclusion as to the reasonableness of believing that injustice may have been done. In our view, Hodson, J. is not to be taken to be laying down that in every matter the ipse dixit of the applicant, even when weighed as to its probability against its surrounding circumstances, must be accepted. There were some preliminary matters which of necessity lie exclusively within the province of determination of this court. For instance, in the present case the court must make up its own mind as to the nature and clarity of the explanations and advice given to the applicant by her solicitors in April and May 1963, and as to her mental fitness to understand her problems and make her decisions at that time. Were the court undecided after reading the evidence on such questions, it would be wrong, in our view, merely to assume that the wife's version of the relevant facts was correct: the court must decide them for itself and may, if it thinks it necessary order cross examination of the deponents, as was recently done in *Jakeman v Jakeman and Tucker*."

In *Stevens v Stevens* (5), at p. 162 Davies, L.J., had this to say:

"As it seems to me, this application to the Divisional Court fall into at least two classes. There is the class where the applicant comes along and says: 'was not served I know nothing about it,' or 'I was deceived, all the proceedings took place behind my back.'

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> In that sort of case the applicant obtains a rehearing almost automatically. The other class is the *Winter* class of case, the *Tucker* class of case, and this class of case, where an applicant may come along and say: 'I knew all about this: I chose not to defend; but it was all wrong; let me defend now and grant me a rehearing.' In a case of that latter kind, speaking for myself, I think that for an applicant to succeed he had to convince the Divisional Court, or this court if it comes before this court, that on the evidence before the court on the application as a whole it is more probable than not that the decree was obtained contrary to the justice of the case."

Also on the point is another recent case of *Nash v Nash* (6). The facts from the headnote are that a wife petitioned for divorce on the grounds of cruelty and desertion. The husband signed the acknowledgment of service and consulted a solicitor, who made an application for legal aid on the husband's behalf to enable him to defend. The husband successfully appealed from the decision of the Legal Aid Committee refusing aid to the Legal Aid Area Committee, whose decision, allowing the appeal did not reach him until at the earliest the day before the wife's petition was heard as an undefended suit and a decree granted in her favour.

On an application by the husband under the Matrimonial Causes Rules 1957, s. 36 (1), for a re-hearing: It was held that where a respondent in divorce proceedings was aware of and was anxious to defend those proceedings and, although no deception had occurred, he was unaware, through ignorance or lack of full advice, of the necessity of taking procedural steps in order to preserve his position, a rehearing should not be granted automatically nor on the other hand, should the court require to be satisfied that on a re-hearing a different result would be more probable than not; it was sufficient that the applicant should satisfy the court that he had a case which, if accepted, might well lead to a different result. That the applicant in the present case had so satisfied the court and the decree nisi should be set aside and a rehearing ordered.

In *Montague* case (supra), Cairns, J., after considering, explaining, and distinguishing the various authorities referred to above had this to say at p. 615:

> "The effect of the cases I have referred to in relation to this present application may, I think, be summarised as follows: We must first decide whether the husband was deceived into believing that the divorce was not going on until a moment when it was too late for him to have a reasonable chance of defending it. This is a question of fact to be decided on the evidence we have read and heard. If he was so deceived, then he is entitled to have the decree nisi set aside and a rehearing ordered unless it is clear that the rehearing would in all probability have the same result as the original hearing. If, however, he was not deceived but deliberately allowed the decree nisi to be made without any effort

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> to resist it, then he can only have it set aside if there is a probability of a different result being achieved on a re-hearing. We should have to assess this probability on the basis of the in formation before us but without attempting to decide the issues of cruelty and condonation, as to which we have ruled that evidence could not be given at this stage. If on one or other of these bases it appears that the husband would, if he had applied promptly,

have been entitled to a rehearing, then we must go on to consider whether he should be allowed to apply out of time. Logically this question may be said to arise at the beginning of the inquiry instead of at the end, and indeed in many cases we so deal with it, but in a case such as the present one it is, I think, appropriate to see what merits there are in the case put forward for a rehearing and only if these appear to be substantial to entertain the application for an extension of time."

In the instant application, the respondent was within time. The question of extension of time did not arise. The actual hearing of the application took some time because shortly after the decree nisi was granted, the petitioner left the country and counsel was not able to obtain instructions. As a result, the matter had at one stage to be adjourned *sine die* with liberty to restore.

At this stage, it is also relevant to observe that all the authorities I have cited on the issue of rehearing were decided before the 1973 Matrimonial Causes Act and pre 1977 Matrimonial Causes Rules. I must hasten to mention that during my research the latest case I was able to find on the point is *Montague v Montague* (1). Be that as it may, although the Matrimonial Causes Act of 1973 made amendments to the law relating to grounds of divorce, the 1977 Matrimonial Causes Rules introduced no change with regard to applications for rehearing. *Rayden on Divorce*, Volume One, 12th Ed. makes mention at p. 639 that the new divorce law under which decrees are granted only on proof of irretrievable breakdown of marriage must be borne in mind when drawing analogies from cases, where rehearing was granted. This being the position, I am of the view that the underlying principle governing applications for rehearing has not changed.

Turning to the application itself, I am satisfied that this is not a case of deception. On the ground of deceit therefore the respondent cannot be entitled to have the decree nisi set aside and rehearing ordered. According to the evidence, the respondent did not seek the services of a lawyer until he received the notice of hearing. In most of the authorities in which the application for re-hearing was granted, the applicants had sought the services of a lawyer and had indicated intentions not to defend (*See* the latest case of *Montague*). The principle whether an application for rehearing shall be granted where no deception exists was stated by Cairns, J., in *Montague* at p. 615 when he said: "If however he was not deceived but deliberately allowed the decree nisi to be made without any effort to resist it, then he can only have it set aside if there is a

probability of a different result being achieved on re-hearing." It is also pointed out in that case that the assessment of the "probability" is based on the information before the court.

Having considered the evidence before me, I am satisfied that the respondent from the time he received the petition to the time of receipt of notice of hearing deliberately did not way to acknowledge service of the same and did not consult any lawyers. But on receipt of the notice of hearing, he appears to have made frantic efforts to seek legal advice. Unfortunately, his lawyer did not only not act promptly but did not take up proper procedural steps to preserve the respondent's position. As a result, the acknowledgment of service was irregularly filed. In these circumstances, if one had to make any criticism it would only be fair not to direct them only to the advocate (not the present one) but also the respondent. The facts of the present application comes close to a class

contemplated by Cairns, J., in *Nash v Nash* case (*supra*) when he said at pp. 1013 to 1014:

> "I agree and add only a few words about the passage which my Lord has cited from the judgment of Davies, L.J. in *Stevens v Stevens*. I notice that in that passage the Lord Justice says: 'As it seems to me, these applications to the Divisional Court fall into at least two classes.' I think there is probably at least one more class. That is the type of case where the respondent in divorce proceedings is aware that the proceedings are in progress and is anxious to defend and although no sort of deception had occurred, nevertheless, through ignorance or lack of full advice he is unaware of the necessity of taking procedural steps in order to preserve his position and has no knowledge of the actual hearing until after it has taken place. In such circumstances, I am of opinion that this court should not automatically or almost automatically grant a rehearing but on the other hand should not require to be satisfied that, if there were a rehearing, a different result would be more probable than not. I think it is necessary and sufficient that the applicant should satisfy the court that he has a case which he wishes to put forward and which, if accepted, might well lead to a different result. The court is not bound to accept the applicant's affidavit at its face value, but on the other hand should not attempt to make any such investigations of its truth as would be appropriate at the hearing of the suit."

The respondent was aware of the divorce proceedings. But through lack of full legal advice, he was unaware of the necessity of taking procedural steps in order to preserve his position. When he learnt of the date of hearing, he had only few working days interrupted by a weekend within which to seek legal advice. In such circumstances, speaking for myself, I entirely agree with Cairns, J., in the passage just quoted above that a court should "not automatically, or almost automatically, grant a rehearing but on the other hand should not require to be satisfied that if there were a rehearing a different result would be more probable than

not." Cairns J's, test in applications of this nature in my opinion makes not only good sense but good law. Applying that test to the facts of the present application, the question I must finally resolve is this:

> Has the respondent on the clear evidence of lack of deception on the part of his wife sufficiently satisfied the court that he has a case which he wishes to put forward and which, if accepted might probably lead to a different result?

The evidence before me has been by way of affidavit. The danger in applications of this nature is that, in the process of analysing the affidavit evidence the court may inadvertently find itself dealing with the actual rehearing of the petition. Be that as it may, I hold the view that the court is entitled to look at the proposed answer and satisfy itself that it presents a reasonable prima facie case to the petition.

The decree nisi was granted on the basis that the marriage had broken down irretrievably on the ground that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with the respondent. The respondent denies in his affidavit and proposed answer

that he has behaved as alleged and that the marriage has broken down. He deposed that he endeavoured to persuade his wife to discontinue the proceedings. In the exhibited proposed answer he alleges provocation and contends that he reasonably believes that the petitioner will reconcile. In opposition, his wife deposed that she never indicated to the respondent that the proceedings were going to be discontinued and at no time did she indicated that she was going to be reconciled to him. She verily believes that there is no possibility of reconciliation.

The respondent categorically stated that he was making this application because there is a possibility of reconciliation. He cited instances where he stayed with his family in Spain and England. He also told the court that his wife has indicated to go with him to India on holiday and stay with him in Zambia. On this evidence has the respondent established a reasonable prima facie case which if substantiated at the hearing if the application is granted would lead to a different result?

I must confess that my task in the instant case has not been easy especially taking into account that the respondent is a professional man and also bearing in mind "the unwisdom and public disadvantage of allowing orders of the court obtained by due process of law to be lightly set aside . . ." [Per Hodson, J., in *Owen v Owen* (supra)]. I have on the other hand very carefully considered the evidence before me. I find that although the respondent is a professional man, he is not a lawyer. I have also from all the material adduced found that the respondent although did not seek legal advice promptly, he did not make a decision not to defend. His primary concern was to persuade his wife to discontinue the proceedings without being aware that there was at the same time need to preserve his position in the matter. I take the view that the respondent did not appreciate the best course in the matter. In my opinion, the respondent's prompt action to seek legal advice when he realised that persuasion was hopeless, and there was no time to spare, coupled with his

denial of the alleged behaviour and his persistent attempts and strong belief in reconciliation, coupled with his wife's conduct after the decree nisi; lead one to an irresistible conclusion that the conduct of the respondent should not be allowed to affect the real issues in the cause. In addition the evidence seems to me to change the complexion of the cause that injustice might result in denying the respondent an opportunity to be heard. On the balance of probabilities, I am satisfied and hold that there respondent had proved a reasonable prima facie case which if accepted at the rehearing might well lead to a different result.

In conclusion, I am of the view that in the interest of justice, I should grant this application. Accordingly, I order that the decree nisi granted by this court on the 26th August 1977, be set aside. A re-hearing is accordingly ordered and the respondent is granted liberty to file the answer. Costs to be paid by the respondent.

Application granted
